

9/10/2020 4:46 PM

Velva L. Price
District Clerk
Travis County
D-1-GN-19-008653
Nancy Rodriguez

Cause No. D-1-GN-19-008653

McCARTY FAMILY REAL ESTATE, LLC)	IN THE DISTRICT COURT
and MTDMHL, LTD.,)	
Plaintiffs)	
)	
vs.)	
)	
SABRE COMMERCIAL, INC.,)	
B3 COMMERCIAL MANAGEMENT,)	OF TRAVIS, TEXAS,
LLC, WESTERN OAKS 19)	
CONSTRUCTION, INC. BRYAN EUWER)	
d/b/a EUWER & ASSOCIATES,)	
AIRCRAFT INC.)	
d/b/a AIRCRAFT MECHANICAL, and)	
HTS, INC.,)	
Defendants)	419TH JUDICIAL DISTRICT

**DEFENDANT/CROSS-PLAINTIFF BRYAN EUWER'S ORIGINAL
CROSS-CLAIM AGAINST DEFENDANT SABRE COMMERCIAL, INC.**

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Bryan Euwer, doing business as Euwer & Associates, ("Euwer") a Defendant in the above numbered and entitled cause, now acting as Cross-Plaintiff, and files this his Original Cross-Claim Against Defendant Sabre Commercial, Inc. ("Sabre") and would respectfully show the Court as follows:

**I.
Parties**

1. Euwer has previously appeared herein and is before the Court for all purposes.

Defendant/Cross-Plaintiff Bryan Euwer's Original Cross-Claim Against Defendant Sabre Commercial, Inc.

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EXHIBIT 2

2. Sabre has previously appeared herein and is before the Court for all purposes.

**II.
Discovery Level**

3. Euwer intends to conduct Level 3 discovery pursuant to Texas Rule of Civil Procedure 190.4.

**III.
Background Facts**

4. On or about October 22, 2015, Western Oaks 19 Construction, Inc. ("Western Oaks"), as Owner, and Sabre, as Contractor, entered into an AIA Document A102-2007 Standard Form of Agreement Between Owner and Contractor and associated contract documents, including AIA Document A201-220, General Conditions of the Contract for Construction ("Contract Documents") for construction of a medical office at 5200-B Davis Lane, Austin, Texas, known as "Waterleaf Medical at Davis Lane" ("the project"). True and correct copies of AIA Document A102-2007 and AIA Document A201-2007 are attached hereto as Exhibits A and B, respectively. Euwer is shown and named as the Architect in those Contract Documents. Among other obligations, the Contract Documents require Sabre to indemnify Euwer as the Architect and to name Euwer as an additional insured on Sabre's insurance policies.

5. Based upon information and belief and the pleadings of other parties in this lawsuit, construction of the project began in or around February 2016. Subsequently, in

or around June 2016, Western Oaks is believed to have sold the property to Plaintiff McCarty Family Real Estate LLC ("McCarty").

6. On December 13, 2019, Plaintiffs sued Western Oaks, Sabre, Euwer and other entities, alleging negligence, negligent misrepresentation, breach of professional duties, breach of contract, breach of warranty, fraud, and gross negligence. Plaintiffs allege design and construction deficiencies, as well as mold.

7. On January 22, 2020, Euwer filed his Original Answer.

8. More than four years after Euwer's work on the project was completed, Euwer was first notified in Plaintiffs' First Amended Original Petition that Plaintiffs were claiming that the project had the following alleged design defects as set forth in Paragraph 4.4 of their pleading: "a) Water Intrusion at Exterior Swing Doors: While head flashing is called for above the lintel in the architectural and shop drawings, there is no protection for the head of the open door frame, the verticals of which run down to the threshold, which is not designed to drain water to the exterior; b) Inadequate Flashing of Windows; c) Lack of Exterior Insulation: Despite using cavity insulation that meets the minimum code energy requirements, the design does not protect against the condensation due to thermal bridging of the metal studs in the backup walls; d) Windows Not Aligned with Insulation: The windows do not appear thermally broken and are located outside of the insulation per the design; e) Lack of Insulation at Parapets: In addition to not having insulation outboard of the metal stud framing, the cavities of the parapets also lack insulation per the design, providing a condensation potential for any air communicating with that space; f) Lack of Separation of Executive Suite Return Plenum from Floor Above: The space above the

ceiling in the Executive Suite is serving as a plenum return and the Executive Suite is a separate tenant occupancy from the adjacent spaces; g) Lack of Crickets at Valley. The roof design appears to allow excessive ponding to occur in the two drain valleys.”

IV. Breach of Contract

9. Euwer has filed an Answer denying all of Plaintiffs’ allegations against Euwer and setting forth his defenses. Nonetheless, Sabre is contractually required to indemnify and hold Euwer harmless from and against all claims, damages, losses and expenses, including but not limited to attorney’s fees, arising out of or resulting from the performance of Sabre’s work under the Contract Documents. The pertinent portion of the indemnity provision in the Contract Documents provides as follows:

To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.¹

Sabre therefore owes Euwer a defense and indemnity in this lawsuit. Further, the

¹ See Exhibit A, at Articles 1, 15, and 16, and Exhibit B at Articles 4 and 3 § 3.18.1.

contract documents require Sabre to name Euwer as an additional insured.²

10. By this pleading, Euwer notifies Sabre and its insurers as to Euwer's claim for defense and indemnity based on the contract documents between Western Oaks and Sabre, which requires Sabre to indemnify and hold Euwer harmless as detailed above.³

11. Despite Sabre's clear contractual obligations, to date, Sabre is not providing defense or indemnity for Euwer. Thus, Sabre is in breach of the Contract Documents. Euwer has been and continues to suffer damages as a result of Sabre's breach of the Contract Documents, including but not limited to Euwer's reasonable and necessary attorney's fees and associated expenses for his defense of this lawsuit, for all of which Euwer seeks to recover from Sabre.

Prayer

Wherefore, premises considered, Euwer requests the Court enter a take-nothing judgment against Plaintiffs and in favor of Euwer, grant this Cross-Claim in favor of Euwer, order Sabre to pay Euwer's damages resulting from Sabre's breach of the Contract Documents, and grant Euwer all other relief to which he may be entitled.

² See Exhibit A, at Article 17 and Exhibit B at Article 11.

³ By this pleading, Euwer also supplements any outstanding Requests for Disclosures to him under Rule 134.2(g) requesting disclosure of any discoverable indemnity and insuring agreements. RESPONSE: There are no insuring agreements presently known other than what Plaintiffs and other parties have disclosed or may disclose in response to written discovery served upon them, and the attached Exhibits A and B indemnity agreements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Defendant/Cross-Plaintiff Bryan Euwer's Original Cross-claim Against Defendant Sabre Commercial, Inc. has been served on the following parties or their attorneys of record, on this 10th of September, 2020, via

- ☒ electronically through the electronic filing manager if the e-mail address of the party or attorney to be served is on file with the electronic filing manager, or, if the e-mail address is not on file, then as shown below
- ☐ hand delivering same
- ☐ depositing same, postage pre-paid, Certified Mail, Return Receipt Requested, number as listed below, in a Post Office or official depository under the care and custody of the United States Postal Service (w/attachments)
- ☐ depositing same, postage pre-paid, regular First Class Mail, in a Post Office or official depository under the care and custody of the United States Postal Service to the other attorneys of record
- ☐ Federal Express, or other overnight delivery service, Waybill No. _____
- ☐ by telephonic document transfer to them at the telefax numbers shown below before 5:00 p.m. CT.
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James O. Guleke II

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Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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